

PUBLIC PROSECUTOR

a

v.

SHARIFF KADIR

HIGH COURT MALAYA, ALOR SETAR

HISHAMUDIN YUNUS J

[KEDAH CRIMINAL TRIAL NO. 45-2-96]

24 JULY 1997

b

CRIMINAL PROCEDURE: *Accused - Unsworn statement from dock - Whether accused has right to make such statement - Whether this right provided by Criminal Procedure Code or Evidence Act*

c

EVIDENCE: *Credibility - Statement from dock - Whether evidence - Whether statement could be cross-examined - Whether carry same weight as statement from witness-box - Whether any weight could be attached to such statement*

d

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). It was the prosecution's case that the accused was caught with 12,793 gms of cannabis as defined in the DDA. At the close of the case for the prosecution, the court found that the prosecution had succeeded in proving beyond reasonable doubt that the accused had in custody, the packages containing the cannabis and the dual presumptions under s. 37(d) and s. 37(da)(vi) of the DDA applied. The accused elected to make an unsworn statement from the dock. The court was concerned with (i) whether the unsworn statement from the dock was evidence, and if not, what weight should be attached to such a statement; (ii) whether an accused has a right to make a statement from the dock.

e

f

Held:

[1] The existence of the right of an accused to make an unsworn statement from the dock is not provided for either in the Criminal Procedure Code or in the Evidence Act. This right originated in the English criminal law and its existence in our legal system was confirmed in *Mohd Salleh v. PP* where it was stated that a person accused of a criminal offence before an established court of justice has at his trial as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so.

g

h

[2] An unsworn statement from the dock is not evidence and the accused cannot be cross-examined on his unsworn statement made from the dock. The statement cannot carry the same weight as evidence given in the witness box under oath. In a trial before a jury, the jury can attach to it

i

a such weight as they think fit and in the case of a trial by a judge sitting alone, the weight that should be given to such a statement must be such weight as the judge thinks fit.

b [3] Evaluating the accused's unsworn statement, the court found the accused's statement to be unsatisfactory and unconvincing. The accused had neither rebutted the presumption on a balance of probabilities nor raised a reasonable doubt on the question of custody or control of drugs. Accordingly, the court found that at the end of the case for the defence, the prosecution had succeeded in proving the charge beyond reasonable doubt.

c [Accused was found guilty; conviction was recorded and sentence passed.]

Cases referred to:

Ip Ying Wah v. Public Prosecutor [1958] MLJ 34 (*refd*)

Mohamed Salleh v. Public Prosecutor [1969] 1 MLJ 104 (*aff*)

d *Ng Hoi Cheu & Anor v. Public Prosecutor* [1968] 1 MLJ 53 (*not foll*)

Public Prosecutor v. Sanassi [1970] 2 MLJ 198 (*foll*)

Shankley v. Hodgson [1962] Crim LR 248 (*refd*)

Udayar Alagan & Ors v. Public Prosecutor [1962] MLJ 39 (*refd*)

Wong Heng Fatt v. Public Prosecutor [1959] MLJ 20 (*foll*)

e **Legislation referred to:**

Dangerous Drugs Act 1952, ss. 37(d), (da)(vi), 39B(1)(a), 39B(2), 40A

Evidence Act 1950, s. 3

Oaths and Affirmations Ordinance 1949, s. 4(1)(a)

Criminal Justice Act 1982 [UK], s. 72

f **Other source referred to:**

The Proof of Guilt, Glanville Williams, p 45

For the prosecution - Azmi Ariffin; DPP

For the accused - Hashim Jahaya; M/s HH Long & Co

g *Reported by Anitha Rajaram*

h

i

JUDGMENT*a***Hishamudin Yunus J:**

The charge against the accused states:

Bahawa kamu pada 22/2/95 jam lebih kurang 4.35 pagi di Kampong Sungai Derhaka, Kota Kuala Muda, di dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu 12,793 gram cannabis, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

b

The prosecution through its witnesses adduced evidence that the police had deployed a police officer, one D/Cpl Yaacob (PW3), to act as an agent provocateur. It is the prosecution case that PW3, in the course of his undercover operation, discovered that the accused was a supplier of cannabis. The police devised a plan to trap the accused by PW3 making an arrangement with the accused offering to buy twenty kilograms of cannabis from him. The unsuspecting accused fell into the trap and was arrested.

*c**d*

The key prosecution witness is, of course, the agent provocateur himself – PW3. At the material time he was attached to the Narcotic Division, Police Contingent Headquarters (IPK), Alor Setar. As directed by his superior officer, Chief Insp. Yaacob Mat Deris (PW4), he carried out an undercover operation at Kota Kuala Muda to investigate drug trafficking activity in that area. Soon, on 14 November 1994, PW3 came into contact with a person living in Kampong Sungai Derhaka, Kota Kuala Muda, called “Abang Mat” or “Namat”. At Namat’s house, PW3 introduced himself as “Osman” and told Namat that he was from Taiping and desirous of buying ganja from him. Namat told PW3 that he did not have the ganja then and asked for time so that he could seek the help of a friend to procure the ganja.

*e**f*

This person, Namat, is the accused.

On 28 November 1994 PW3 again went to Kampung Sungai Derhaka and met the accused by the roadside. PW3 inquired about the drug and the accused told him that he was still trying to contact his friend.

g

On 23 January 1995 PW3 again went to the accused’s house but the latter told him that he still had not got the drug supply. This time, however, the accused gave PW3 his house phone number.

h

On 21 February, PW3 phoned the accused and this time the accused told him that he had obtained the supply from his friend. The accused asked PW3 to come to Kota Kuala Muda. PW3 told the accused that he wanted to buy 20 kg. of the ganja and the latter agreed to sell to PW3 that amount at the price of RM1,200 per kg.

i

- a* On the same day PW3 reported this information to PW4. On the same day PW4 held a briefing at the office of the Narcotic Division, IPK, Alor Setar. At the briefing, apart from PW3 and PW4, there were five other officers in attendance. It was planned that PW3 was to meet the accused at a water lock (*tandop*) at Kampong Sungai Derhaka. PW4 handed over to PW3 money amounting RMI6,000 in notes for the purpose of the drug “purchase”. It was also planned that PW4 and the other officers were to lay an ambush at the scene.

- c* PW3 arrived by car at the *tandop* at Kampong Sungai Derhaka around 4.30 a.m. 22 February 1995. There, PW3 waited for the accused. The accused later turned up riding a motorcycle. The accused led PW3 to a junction where there was a lane on the right side of the road and PW3 followed behind in his car. At the junction, the accused stopped, got down his motorcycle, walked into the lane and disappeared. PW3 waited in his car by the side of the road at the lane junction. Moments later the accused reappeared carrying a plastic sack.
- d* At this moment, the police officers who had been waiting in ambush rushed out from their respective hiding positions and the accused was arrested by one Det/Sgt Hamzah bin Ayob (PW5). Just before the arrest PW4 shouted “Polis!”.

- e* Both PW4 and PW5 testified seeing the accused carrying the white sack at the time of the arrest. And PW3 testified that at the moment when PW4, PW5 and the others rushed to effect the arrest, he withdrew from the scene, but he also gave evidence that he saw the accused carrying the sack at the time when the police rushed towards the accused. PW4 told the court that, immediately after the arrest, he opened the sack and found in it seven packages containing cannabis.

- f* PW2, the Government Chemist, gave evidence confirming that the packages seized by the police from the accused contained 12,793 gram of cannabis as defined in the Dangerous Drugs Act 1952 (the DDA).

- g* At the close of the case for the prosecution, after listening to submissions, I was satisfied that the prosecution had succeeded in proving beyond reasonable doubt that the accused had in custody or under his control the seven packages containing the cannabis and therefore the dual presumptions under s. 37(d) and s. 37(da)(vi) of the DDA apply.

- h* I found the prosecution case to be simple, clear-cut and straightforward. The evidence of an agent provocateur is given special attention in the DDA. The relevant provision is s. 40A.

- i*

I found no reason to doubt the evidence of any of the prosecution witnesses. They had been cross-examined by learned defence counsel and they had been consistent throughout in their testimony.

a

I therefore called upon the accused to enter his defence. The three options were explained to him. The accused elected to make an unsworn statement from the dock.

b

The right of an accused to make such a statement from the dock is not provided for either in the Criminal Procedure Code or the Evidence Act. This right, which originated in the English criminal law had somehow, due to the history of our legal system and its affiliation to the English legal system, been allowed to seep into our legal system by our courts. The existence of such a right in the our legal system was aptly described by Sharma J in *Public Prosecutor v. Sanassi* [1970] 2 MLJ 198 as:

c

... an incident of history, political bondage or affiliation with a system of law we have so gainfully remained associated with.

d

In England, the conferment of such a right was historically judge-made law introduced into the legal system in the early part of the nineteenth century (*The Proof of Guilt*, Glanville Williams, p. 45). Later it was given statutory recognition in the Criminal Evidence Act 1898 of England which enabled every person charged with an offence to be a witness for the defence in every stage of the proceedings; and s. 1(h) of the Act provides that:

e

... nothing in this section shall affect ... the right of the person charged to make a statement without being sworn.

In *Mohamed Salleh v. Public Prosecutor* [1969] 1 MLJ 104, Wee Chong Jin CJ in delivering the judgment of the Federal Court said (at p. 105):

f

The right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond reasonable doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect.

*g**h*

As to the case before me, the accused made only a brief statement from the dock. He stated the following:

i

- a* (1) He was a farmer and also a padi planter.
- (2) He was befriended by a person who introduced himself to him as "Man". This Man came to his house several times. On the first occasion it was just normal conversation but after several times Man began to talk about ganja.
- b* (3) Each time Man talked about ganja, the accused would tell him that he knew nothing about ganja.
- (4) After four months, he decided to tell Man that he would ask his friends about ganja.
- c* (5) After asking several friends, only one of them, by the name of Omar, who said that he had ganja.
- (6) The accused then told Man about Omar having ganja and Man agreed to buy ganja from Omar. The accused then told Omar about Man wanting to buy the ganja.
- d* (7) On the day of the arrest, Man came with a car. The accused followed Man from behind. On arriving at a junction, two or three persons pounced (diterkam) on him from behind. They searched him but no ganja was found on him.
- e* (8) After searching at the scene for about ten minutes, the men produced from a place about twenty yards away a plastic bag containing ganja. The same men searched his house and subsequently took him to Kota Kuala Muda Police Station.
- f* The accused did not call any witness.
- It is the law that when an accused makes a statement from the dock he is not liable to cross-examination by the prosecution (*Ip Ying Wah v. Public Prosecutor* [1958] MLJ 34.)
- g* In *Udayar Alagan & Ors v. Public Prosecutor* [1962] MLJ 39, it was held that although it was within the legal rights of the accused to elect to make a statement from the dock instead of giving evidence from the witness-box, he took this course at his own peril.
- h* Before I proceeded to evaluate the accused's unsworn statement, I was faced with a fundamental question of law: Is an unsworn statement from the dock "evidence"? This is a difficult question. There is a conflict of authorities on this issue. Smith J in *Wong Heng Fatt v. Public Prosecutor* [1959] MLJ 20 held (at p. 21):
- i*

I do not consider that a statement by an accused from the dock is evidence in view of the provisions of s. 4(1)(a) of the Oaths and Affirmations Ordinance, 1949 the essential part of which reads "... oaths shall be taken by witnesses, that is to say, all persons who ... give evidence ... before the court ..." Since the appellant was not sworn or affirmed he did not give evidence.

a

But in *Ng Hoi Cheu & Anor v. Public Prosecutor* [1968] 1 MLJ 53 Chang Min Tat J (as he then was), disagreeing with Smith J in *Wong Heng Fatt*, held that a statement from the dock is evidence for what it is worth, and entitles the accused or his counsel to address the court. The reason given by the learned judge was that such a statement fell "fairly and squarely" within the definition of "evidence" in the Evidence Ordinance. Section 3 of the Evidence Act 1950 (known as the "Evidence Ordinance" prior to its revision in 1971) defines "evidence" as follows:

*b**c*

"evidence" includes:

(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;

d

(b) all documents produced for the inspection of the court: such documents are called documentary evidence.

However, Sharma J in *Sanassi* preferred the decision of Smith J to that of Chang Min Tat J. The learned judge formed his opinion by reading s. 4(1)(a) of the Oaths and Affirmations Ordinance 1949 together with the definition of "evidence" in s. 3 of the Evidence Ordinance.

e

Sharma J. said (at p. 201):

f

... I am of the opinion that any person who is entitled to be called a witness in a case has to take an oath or an affirmation as provided for in s. 4(1)(a) of the Oaths and Affirmations Ordinance.

With the greatest respect, I prefer the view of Smith J and Sharma J, that is to say, an unsworn statement from the dock is *not* evidence (see also the English case of *Shankley v. Hodgson* [1962] Crim. LR 248).

g

If the position is that the accused's unsworn statement from the dock is not evidence, the next basic and pertinent question that follows is: what weight should be attached to such a statement? This is another difficult issue, but one thing is clear though: since, as a matter of law, an accused cannot be cross-examined on his unsworn statement made from the dock, such a statement cannot carry the same weight as evidence given in the witness-box

*h**i*

a under oath. In *Mohamed Salleh* the trial judge directed the jury to give the unsworn statement of the accused “such weight as the jury think fit” and this direction was upheld by the Federal Court as proper. The Court ruled:

b With regard to the question of prejudice arising out of the trial judge’s comment on the probative value of the unsworn statement of the appellant, we are of the opinion that it is proper for a judge in summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross-examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case.

c Applying this principle to the case of a trial by a judge sitting alone (ie without a jury), like in the present case, the weight that should be given to such a statement must be such weight as the judge thinks fit.

d In the United Kingdom, the right of an accused person to make an unsworn statement from the dock was abolished in 1982 by s. 72 of the Criminal Justice Act 1982. This move by the United Kingdom Parliament was in response to the recommendation by the Criminal Law Revision Committee which in its Eleventh Report said (Cmnd. 4991):

e We are strongly of the opinion that the right to make an unsworn statement about the facts instead of giving evidence on oath or affirmation should be abolished. Whatever justification there may have been for preserving the right in 1898, we think that nowadays the accused, if he gives evidence, should do so in the same way as other witnesses and be subject to cross-examination.

f Section 72 (which came into force on 24 May 1983) provides:

g 72 (1) Subject to sub-ss. (2) and (3) below, in any criminal proceedings the accused shall not be entitled to make a statement without being sworn, and accordingly, if he gives evidence, he shall do so on oath and be liable to cross-examination; but this section shall not affect the right of the accused, if not represented by counsel or a solicitor, to address the court or jury otherwise than on oath on any matter on which, if he were so represented, counsel or a solicitor could address the court or jury on his behalf.

h (2) Nothing in sub-s. (1) above shall prevent the accused making a statement without being sworn:

(a) if it is one which he is required by law to make personally; or
(b) if he makes it by way of mitigation before the court passes sentence upon him.

i (c) [Transitional].

With all humility, I respectfully suggest that perhaps our Parliament might consider making a similar move. In my humble view, besides the theoretical legal difficulties inherent in such a practice (of allowing unsworn statement to be made by an accused), as I have endeavoured to point out, such a practice also appears to be somewhat inconsistent with the scheme of the Criminal Procedure Code.

However, be that as it may, as for the moment, the reception of unsworn statements from the dock is still part and parcel the law of this country and it is my solemn duty as a judge to apply the law as it is – no matter what my personal views are on the matter.

Now, in the present case, I had evaluated the accused unsworn statement bearing the above principles and authorities in mind.

I found the accused's statement most unsatisfactory and most unconvincing. First, it was not explained whether the said person called "Man" was the prosecution witness, PW3.

Second, it is difficult to understand why the accused decided to tell Man that he would inquire from his friends about ganja when this Man never asked him to do so. All that Man did during his conversations with the accused (assuming such conversations did take place as claimed by the accused) was merely to "bercerita tentang ganja" or to "cakap pasal ganja".

Further, it was not explained whether the men who pounced on him were policemen or any of the prosecution witnesses. It was also not explained why, on the day of the arrest, he waited for Man by the side of the lane and why he followed behind Man's car. Where were they going to?

I found that the accused had neither rebutted the presumptions on a balance of probabilities nor at least raised a reasonable doubt on the question of custody or control of the drugs.

Accordingly, I found that at the end of the case for the defence the prosecution had succeeded in proving the charge beyond reasonable doubt. I found the accused guilty of the charge. I recorded the conviction and passed the mandatory death sentence.

*a**b**c**d**e**f**g**h**i*